High court of azad jammu & Kashmir

[Circuit Mirpur]

Writ Petition No. 113/2018;

Date of Institution. 26.03.2018;

Date of Decision. 24.07.2018.

Muhammad Naeem Asghar S/o Muhammad Asghar, caste Malik Awan, R/o Village Dobay Tehsil Barnala District Bhimber.

…… Petitioner

Versus

1. Aneela Nazir D/o Nazir Hussain,
2. Ayet Naeem D/o Naeem Asghar,
3. Irham Naeem D/o Naeem Asghar R/o Village Dobay Tehsil Barnala District Bhimber, A.K., (respondents No.2 & 3 through respondent No.1),
4. Civil Judge Barnala/Judge Family Court Brnala Tehsil Barnala District Bhimber, A.K.

….. Respondents

writ petition

Before: - Justice Chaudhary Muhammad Munir, J.

Present:

Mr. Muhammad Munir Haider, Advocate for the petitioner.

Aneela Nazir, respondent along-with Ehtesham-ul-Haq Khawaja, Advocate.

O r d e r:

Through the captioned writ petition filed under Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974, the petitioner challenged the validity of order passed by Judge Family Court, Barnala dated 27.02.2018.

2. Precise facts of the case are that marriage between the petitioner and respondent No.1 was solemnized on 24.01.2010. During wedlock respondents No.2 and 3 were born. It has been stated that respondent No.1 left the house of her husband in the year 2016 without any plausible reason. The petitioner filed a suit for restitution of conjugal rights in the court of Civil Judge, Barnala. It has also been stated that respondents No.1 to 3 also filed a suit for maintenance in the same court. It has further been stated that during the course of proceedings, respondents No.1 to 3 filed an application for interim maintenance on 04.11.2017, which was objected to by the petitioner. It has been alleged that respondent No.4 fixed the interim maintenance @ Rs. 12,000/- per month for the respondents through impugned order dated 27.02.2018, hence, this writ petition.

3. Preliminary arguments on behalf of the parties heard. Learned counsel for the petitioner argued that the impugned order dated 27.02.2018 passed by Civil Judge Barnala is contrary to Family Courts Act, 1993. He further argued that the impugned order has been passed without considering financial position of the petitioner, hence, not sustainable. Learned counsel emphasized that no provision is provided for interim maintenance in the Family Courts Act, 1993 as well as Family Courts Procedure Rules, 1998. Learned counsel prayed for setting aside the impugned order.

4. On the other hand, learned counsel for the respondents argued that the Family Court granted interim maintenance for the minors only and the petitioner is under legal obligation to maintain his children. He also argued that the instant writ petition has been filed against the interim order, which is not maintainable. Learned counsel prayed for dismissal of the writ petition.

5. I have heard learned counsel for the parties and gone through record of the case. The moot point involved in this case is that whether the writ petition is maintainable against the interlocutory order passed by the Family Court. It has been observed here that the impugned order is an interlocutory order in which no final verdict is pronounced, but an ancillary order is passed with the intention to keep the same operative till final order/decision is passed in the pending matter. It is also observed that under the Family Courts Act, 1993 and the Rules made thereunder, the legislature has not provided remedy of appeal, revision or review against an interim order, therefore, a party should wait until a final order has been passed against him and then challenged it before the proper forum. Hon’ble Supreme Court of Pakistan in *Syed Saghir Ahmed Naqvi Vs. Province of Sindh through Chief Secretary S&GAD, Karachi and others* [1996 SCMR 1165] held as under:-

*“Constitutional jurisdiction, exercise of statute excluding a right of appeal from the interim order could not be bypassed by bringing under attack such interim orders in constitutional jurisdiction. Party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such order.*

6. The object of the Azad Jammu & Kashmir Family Courts Act, 1993 is to expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith. The aforesaid Act has been established for protection and convenience of the weaker and vulnerable segments of the society, i.e. women and children. There is no provision of appeal, revision or review is provided against interlocutory orders passed by a Family Court in aforesaid Act. The wisdom behind is to speedy disposal of the family matters, as it has been provided in Section 12 of the Azad Jammu & Kashmir Family Courts Act, 1993 that *a Family Court shall finally decide a case before it, within a period of four months from the date of the presentation of the plaint.* If we allow writ petition against interlocutory orders, then spirit of section 12 ibid would be frustrated.

7. It is however necessary to mention here that although provision of interim maintenance is not provided in the Azad Jammu & Kashmir Family Courts Act, 1993, or the Rules made thereunder, however, the Family Court can adopt any procedure to meet the situation to do the substantial justice between the parties. This view finds support from case titled *Muhammad Saad Ali & 2 others Vs. Mst. Maryam Khan & 2 others* [2014 CLC 715] wherein the Hon’ble Peshawar High Court held as under:- ―

*“The Family Court has got every jurisdiction to adopt any procedure/ law to meet the situation to do the substantial justice between the parties and to secure the ends of justice. Since the act, 1964 ibid is not comprehensive enough to meet every conceivable eventuality. So, the Family Court can adopt every procedure/law in furtherance of dispensation of justice unless the procedure/law going to be adopted is specifically prohibited. ----”*

This view further supported by case titled *Muhammad Sarwar Vs. Sughran Bibi and 2 others* [1996 MLD 1057 Lahore], wherein at pages 1059-1060 of the report it has been held as under:-

*“3. In support of this petition petitioner’s learned counsel has contended that there is no jurisdiction vesting in the Family Court to direct the payment of any interim maintenance as there is no specific provision in West Pakistan Family Courts Act, 1964 empowering it to pass such an order.*

*4. This contention of the learned counsel has no force. It is true that there is no specific provision in West Pakistan Family Courts Act, 1964 for grant of any maintenance during pendency of a suit but it does not mean that the Court is powerless to pass such an order as and if justice of the situation requires. It is settled principle of law that if a Court or Tribunal has the authority to pass a final order it can also pass an interim order unless the power to do so is expressly or impliedly excluded. See Zaffar Iqbal v. The Province of Sindh and others PLD 1973 kar. 383, Molvi Muhammad Yaqub v. Chairman, Election Tribunal PLD 1976 SC 626, Sindh Employees’ Social Security Institution and another v. Admajee Cotton Mills Ltd. PLD 1975 SC 32 and Commissioner, Khairpur Division, Khairpur and another v. Ali Sher Sarki PLD 1971 SC 242.*

*5. It is also to be seen that the Family Court while hearing suits under the West Pakistan Family Courts Act, 1964 acts as a Court and is not a persona designata. There is an inherent jurisdiction vesting in any Court to pass such interim orders as may become necessary in the circumstances of a given case. There is nothing in the Family Courts Act, 1964 from which it could even remotely be inferred that the Court is denuded of its power to pass an interim order. It is trite law that all procedures which are not prohibited by a statute must be taken to be permissible and the Court should not proceed on the assumption that there should be a specific provision for exercise of any power. Such an interpretation hampers the cause of justice.*

*6. It is a matter of common knowledge that even suits filed under the Family Courts Act, 1964 are not decided within days but on the other hand the trial is generally delayed for one reason or the other and matter lasts for months if not years. There may be a case where the mother of the minor has no means whatsoever to provide even bare minimum necessities of life or even sustenance. In these circumstances, to hold that the Court is powerless to come to the aid of the minor would be a negation of justice. Furthermore it cannot be denied that both the statutory law as also the Islamic principles of personal law the father is obliged to provide maintenance to his child. That being so, there is no reason as to why the payment of maintenance must be delayed till the matter is finally decided by the Court. In the present case it was alleged in the application for interim relief that the minor child was suffering from serious ailment and his treatment required a lot of expenses which the mother of the minor was unable to bear. Keeping in view this fact there was ample justification for the Family Court to have directed payment of Rs. 600/- per month as interim maintenance subject to adjustment at the time of final decision of the suit.”*

8. Even otherwise, petitioner is admittedly father of minors who is under legal as well as moral obligation to maintain and support his children as per injunctions of Islam. The impugned order passed by the Family Court for grant of interim maintenance to the minor children is quite in accordance with the injunction of Islam, which could not be assailed in the writ petition because when a statute does not provide any appeal, revision etc., against interlocutory order, same could not be challenged by way of Constitutional petition as it will tantamount to defeat and divest the intent of legislature.

9. For what has been discussed above, the writ petition being not maintainable is dismissed in limine. The trial court is directed to conclude the matter within stipulated period, in accordance with law.

Circuit Mirpur

24.07.2018 (M) **Judge**